



**THE COURT OF APPEAL – UNAPPROVED**

**Court of Appeal Number: 2021/94  
High Court Record No: 2006 106 S**

**Murray J.  
Edwards J.  
Binchy J.**

**Neutral Citation Number [2023] IECA 139**

**BETWEEN/**

**ULSTER BANK LIMITED**

**PLAINTIFF**

**-AND-**

**(BY ORDER) PROMONTOIRA (OYSTER) DAC**

**PLAINTIFF/  
RESPONDENT**

**-AND-**

**TIMOTHY QUIRKE AND JOAN QUIRKE**

**DEFENDANTS/  
APPELLANTS**

**Costs Ruling of Mr. Justice Binchy delivered on the 8<sup>th</sup> day of June 2023**

1. On 12<sup>th</sup> December last I delivered a judgment in these proceedings concerning two separate applications advanced by the respondent pursuant to a single motion issued by the respondent seeking orders pursuant to (i) O.17, r.4 and (ii) O.42, r.24 of the Rules of the Superior Courts. The application advanced pursuant to O.17, r.4 sought an order directing that the proceedings, originally issued by Ulster Bank Ireland as plaintiff, should thereafter

be carried on as between the respondent, Promontoria, as plaintiff, and the appellants. The application advanced pursuant to O.42, r.24 sought leave to issue execution in the proceedings on foot of the judgment previously obtained by Ulster Bank against both appellants on 27<sup>th</sup> March 2009 (the “Judgment”). In the High Court, the respondent was successful with both applications, albeit with some modification as regards the order sought pursuant to O.17, r.4. In that regard, the High Court considered that the more appropriate order to make was one joining Promontoria as a co-plaintiff to the proceedings, rather than substituting it for Ulster Bank.

2. In their appeal to this Court against the orders made by the High Court, the appellants were unsuccessful in seeking to set aside the order made by the High Court pursuant to O.17, r.4, but were successful in their appeal from the order of the High Court made pursuant to O.42, r. 24. In circumstances where both parties had enjoyed a measure of success in the appeal, I invited the parties to make submissions in relation to costs.

3. In the High Court, the appellants had raised four objections to the application made under O.17, r.4 and were unsuccessful under each heading. They carried forward two of those objections on appeal, one of which was concerned with whether or not a global deed of transfer executed by Ulster Bank in favour of the respondent was effective to transfer the Judgment to the respondent, (even though the Judgment had not been expressly referred to in the global deed of transfer) and the other of which was concerned with whether or not it is possible to assign the benefit of part only of a judgment. I held in favour of the respondent as regards the answers to each of these questions. In addressing the second of these questions, it was necessary to consider an issue not previously considered in this jurisdiction, that being whether or not *Forster v. Baker* [1910] 2 KB 636 CA, a decision of the Court of Appeal of England and Wales (Kings Bench Division) to the effect that it is not possible to assign part of a judgment, represents the law in this jurisdiction. I concluded that it did, but

I also concluded that in circumstances such as those obtaining in this case, in which the original plaintiff – Ulster Bank – who had obtained judgment against the appellants, had remained a party to the proceedings, the assignee of part of the judgment debt *may* be given leave to execute, subject to meeting any other relevant requirements

4. Notwithstanding that conclusion however, I concluded that the appeal from the order of the High Court made pursuant to O.42, r.4, whereby the High Court had granted the respondent leave to execute, should be allowed, because no reason had been given by Ulster Bank to explain why no steps had been taken to enforce the Judgment within six years, or, for that matter, for a further period of three years and nine months. However, the respondent had taken steps, following the judgment of the High Court under appeal, to register a judgment mortgage securing the Judgment over property of the appellants, and the respondent informed the Court that it intended to proceed to seek a well charging order and an order for sale of the property of the appellants to satisfy the Judgment. The respondent has already issued a special summons seeking such relief, although it has expired, not having been served within 12 months of issue, and an application for renewal of the same will be required if the respondent wishes to proceed further with those proceedings

#### **Submissions**

5. The appellants submit that, while the respondent has been successful in its application to be joined as a plaintiff to the proceedings, it has achieved nothing tangible as a result of that success, because the purpose of the application was to enable it to proceed on foot of the Judgment. The appellants submit that, having been refused permission to execute the Judgment, it will not now be possible for the respondent to obtain a well charging order, and that it is highly unlikely that there is any alternative form of enforcement of the Judgment available to the respondent. For the same reason, the appellants submit, it is not correct to

characterise the outcome of the appeal as a “one all draw” as the respondent does in its submissions.

6. For its part, the respondent submits that while the effect of this Court’s judgment is to preclude it from issuing certain forms of execution, nonetheless, it still has open to it a variety of forms of enforcement, other than those to which Order 42 applies, although it does not elaborate on this general proposition. The respondent submits that the appellant has succeeded on a narrow basis, whereas the respondent has prevailed in a number of important issues of principle raised in the course of the appeal. Accordingly, the respondent submits that the Court should either make an order in its favour for payment of all of the costs of the appeal by the appellants, or, failing that, an order for such proportion of its costs as the Court considers appropriate.

7. As to costs in the Court below, the respondent submits that this Court should not interfere with the order made by the High Court directing the appellants to pay all of its costs, because the respondent was justified in bringing an application to enforce the Judgment, even if the avenues open to it for enforcement may be more limited in light of the decision of this Court

8. The respondent refers to the following passage from the decision of Murray J. (when in this Court) in *Chubb European Group SE v. The Health Insurance Authority* [2020] IECA 183:

“Chubb, not having been ‘*entirely successful*’ in its proceedings has no entitlement under s.169(1) of the 2015 Act to its costs. The Court has, however, the power under s.168(2)(a) to make an order in its favour to the extent that it was ‘*partially successful*’ in the proceedings, just as it has the power to make an order on the same basis in favour of HIA. That power extends to awarding ‘*costs relating to the successful element*’ of the proceedings. The difference between the two provisions is

important: the party who prevails entirely has a right to costs unless there is a reason not to order them. A party who only succeeds partially may obtain an order for costs in respect of the successful aspect of its claim if, having regard, *inter alia*, to the criteria specified in s.169(2), it is appropriate to award them. Issues will arise in other cases as to what exactly '*entirely successful*' means. Depending on the precise construction placed on that phrase, the pre-existing position that a party who won '*the event*' but succeeds in respect of only some of the issues addressed in support of the relief it obtains is presumptively entitled to all its costs, may have been changed by the Act."

9. The respondent submits that in this case neither party has been entirely successful in this appeal and that on one view the appeal judgment might be characterised as a "one all draw". However, the respondent submits that that would be an overly simplistic analysis. The respondent identifies five issues addressed in the appeal judgment, and submits that it was successful in four of those issues. It acknowledges, as it must, that it was unsuccessful in persuading this Court that it had provided sufficient reasons for the delay in executing the Judgment.

10. The respondent also submits that in their notice of appeal, the appellants had identified 27 grounds of appeal, many of which were not argued at the hearing. Moreover, while the submissions filed by the appellants prior to the hearing identified six issues, a number of those were not pursued in oral argument.

### **Decision**

11. In my view, the characterisation of the outcome of this appeal as a "one all draw" is a fair characterisation in the particular circumstances of this case. The respondent could not succeed in its application for leave to execute under O.42, r.24 without first obtaining an order under O.17, r.4. The appellants opposed that application. In doing so (as they of course were entitled to do) they caused the respondent to incur costs considerably in excess

of those than would have been incurred had the appellants simply consented to the application. If the O.17, r.4 application had been made on a stand-alone basis and had taken the same course, there could not be any doubt that the respondent, having been entirely successful with that application, would have been entitled to an order for its costs and in my view it would be both incorrect and unfair to deprive it of that entitlement because it was, separately, unsuccessful in the O.42, r.24 application.

**12.** Moreover, while the appellants submit that all avenues of execution are now closed to the respondent, they very fairly acknowledge that the judgment mortgage procedure is not to be treated as a form of execution, citing Canning on “Limitation of Actions” (2<sup>nd</sup> Ed, para. 5-10) and the authorities referred to therein. And while they submit that it is “highly unlikely” that the respondent would be successful in obtaining an order to renew the special summons referred to above, I do not think that it would be appropriate for this Court to proceed on the basis that that is a foregone conclusion such as to justify an order requiring the respondent to pay the costs of the appellants in both applications.

**13.** As to the O.42, r.24 application, the appellants, having been entirely successful in opposing it, are clearly entitled to an order for their costs. It follows from the above that the appropriate order to make as regards the costs incurred by the parties in connection with this appeal is that each of the parties should bear their own costs.

**14.** As regard to the costs incurred in the court below, the respondent, having been entirely successful in that court, obtained an order directing the appellants to pay all of its costs incurred in that court. Since it has been unsuccessful on this appeal in its application under O.42, r.24, that order cannot now stand. I am of the opinion that, as with the costs of the appeal, the appropriate order to make in relation to the costs incurred by the parties in the court below is that each of the parties should bear their own costs.

**15.** Since this ruling is being delivered remotely, Murray J. and Edwards J. have authorised me to indicate their agreement with it.